Nos. 18-36030, 18-36038, 18-36042, 18-36050,
18-36077, 18-36078, 18-36079, 18-36080

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants,

and

STATE OF WYOMING et al.,
Defendant-Intervenor-Appellants

On Appeal from United States District Court for the District of Montana
Nos. 9:17-cv-00089; 9:17-cv-00117; 9:17-cv-00118; 9:17-cv-00119,
9:17-cv-00123, 9:18-cv-00016 (Hon. Dana C. Christensen)

APPELLANTS STATE OF MONTANA AND MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS' OPENING BRIEF

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GLOSSARY

APA ..... Administrative Procedure Act

DPS ..... Distinct Population Segment

E.R. ..... Federal Appellants' Excerpts of Record

ESA ..... Endangered Species Act

GYE ..... Greater Yellowstone Ecosystem

IGBC ..... Interagency Grizzly Bear Committee

MFWP ..... Montana Department of Fish, Wildlife and Parks

MSER ..... Montana Supplemental Excerpts of Record

NCDE ..... Northern Continental Divide Ecosystem

FWS ..... United States Fish and Wildlife Service

YGCC ..... Yellowstone Grizzly Coordinating Committee

JURISDICTIONAL STATEMENT

The United States District Court for the District of Montana, Missoula Division ("District Court") had jurisdiction under 28 U.S.C. § 1331 over the claims brought by Plaintiff-Appellees Crow Tribe of Indians et al. under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.,* and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*. Defendant-Appellants State of Montana and Montana Department of Fish, Wildlife and Parks ("Montana") appeal the September 24, 2018, order of the District Court that denied its cross motion for summary judgment and granted judgment in favor of Plaintiff-Appellees. 1 E.R. 1-49[1]. Montana filed a notice of appeal on December 21, 2018 (2 E.R. 50) within the time allowed by Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the United States Fish and Wildlife Service ("FWS") fulfilled its duties under the ESA with respect to analyzing the impact of delisting the Greater Yellowstone Ecosystem grizzly bear population on other grizzly populations.

2. Whether FWS's 2017 Final Rule (2 E.R. 83) (82 Fed. Reg. 30502, June 30, 2017) ("2017 Final Rule") establishing a Greater Yellowstone Ecosystem

[1] Citations to Federal Appellants' Excerpts of Record (E.R.) are to volume and page number.

Distinct Population Segment ("Yellowstone DPS") of grizzly bears and removing it from the ESA list of threatened species was arbitrary, capricious or an abuse of discretion because:

A. The Conservation Strategy, which guides grizzly bear management after delisting, does not contain a provision that would require that population and mortality thresholds be automatically recalibrated in the event that a new method for estimating the grizzly population is adopted; and

B. The Conservation Strategy does not mandate genetic augmentation through translocation of grizzly bears if natural connectivity between the Greater Yellowstone Ecosystem and Northern Continental Divide Ecosystem grizzly population is not achieved by a date certain.

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, all pertinent authorities are set forth in the addendum at the end of this brief.

STATEMENT OF THE CASE

I. Introduction

Appellant Intervenors appeal the Order of the District Court vacating FWS's June 30, 2017 Final Rule to designate the Greater Yellowstone Ecosystem ("GYE") population of grizzly bears a distinct population segment and to remove that population from the list of threatened species under the ESA. *See* 82 Fed. Reg.

30502 (June 30, 2017). 2 E.R. 83. At the District Court, Plaintiffs Crow Indian Tribe and other consolidated organizational Plaintiffs ("Plaintiffs") sought judicial review of the 2017 Final Rule. Montana filed answers to four of the five cases consolidated by the District Court (appellees Wild Earth Guardians, Northern Cheyenne Tribe *et al.*, Alliance for the Wild Rockies, and Humane Society *et al.*) Montana did not file an answer to the Crow Tribe's complaint.

On September 24, 2018, the District Court entered an Order finding that FWS violated the ESA because it failed to analyze the threat posed by the 2017 Final Rule outside of the GYE, that FWS's failure to require a recalibration provision in the Conservation Strategy is arbitrary and capricious and FWS's determination that it need not provide for either natural connectivity or translocation is contrary to the best available science. 1 E.R. 2. The Court vacated the 2017 Final Rule. *Id.* Judgement was entered on October 23, 2018. 1 E.R. 1.

The ESA was enacted to halt and reverse the trend toward species extinction. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 184 (1978). In the case of the grizzly bear in the GYE, FWS, other federal agencies, and the states of Montana, Idaho, and Wyoming have done just that. Prior to the 2017 Final Rule, the GYE grizzly population spent almost 42 years under the protection of the ESA. The question before the Court is not whether the GYE population of grizzly bears deserves to be conserved, it is whether FWS correctly determined that the

Yellowstone population of grizzly bears is no longer threatened.

II. The Endangered Species Act

The ESA was enacted to "provide a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). ESA defines the term "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range. . .". 16 U.S.C. §1532(6). A "threatened species" is one which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. §1532(20).

The ESA requires the Secretary of the Interior to determine whether any species is an endangered species or a threatened species because of any of five factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (C) disease or predation;
>
> (D) the inadequacy of existing regulatory mechanisms; or
>
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). FWS must consider the same five criteria for both listing and delisting. *Id.*; 50 C.F.R. § 424.11(c)(d); *National Wildlife Federation v.*

Norton, 386 F. Supp. 2d 553, 558 (D. Vt. 2005). Any one of the five factors may support a listing decision. *Kern County Farm Bureau v. Allen,* 450 F.3d 1072, 1075 (9th Cir. 2006). Determinations required by subsection (a)(1) must be made solely on the basis of the best scientific and commercial data available. 16 U.S.C. § 1533(b)(1)(A).

In furtherance of its broad conservation goal, the ESA sought to "encourag[e] the States and other interested parties . . . to develop and maintain conservation programs" as a "key" to "better safeguarding" fish and wildlife. 16 U.S.C. § 1531(a)(5). Indeed, a purpose of the Act is to foster state cooperation in the conservation of threatened or endangered species. *Humane Society of the U.S. v. Zinke*, 865 F.3d 585, 598 (D.C. Cir. 2017). The ESA requires that listing decisions be made "*after taking into account those efforts, if any, being made by any State . . . to protect such species, whether by predator control, protection of habitat and food supply or other conservation practices."* 16 U.S.C. § 1533 (b)(1)(A), emphasis added. The requirement to take state efforts into account applies to a decision to list, reclassify or delist a species. 50 C.F.R. § 424.11(f).

III. Prior Yellowstone Grizzly Litigation

On March 29, 2007, FWS published a rule designating the Yellowstone region population of grizzly bears a distinct population segment and removing that segment from the list of endangered and threatened species. The delisting was

challenged in the Federal District of Montana. *Greater Yellowstone Coalition v. Servheen, et al.*, 672 F. Supp. 2d 1105 (D. Mont. 2009). There, the District Court found two faults with the 2007 rule: that FWS was arbitrary and capricious in its evaluation of whitebark pine and that regulatory mechanisms were inadequate because they were not legally enforceable. *Id.* at 1118-1120. On appeal, this Court upheld the District Court finding that FWS was arbitrary and capricious in its failure to evaluate the impact of the loss of whitebark pine on the grizzly bear because while the rule presented "considerable data demonstrating a relationship between pine seed shortages, increased bear mortality and decreased female reproductive success," the rule presented no data indicating that whitebark pine declines will not threaten the Yellowstone grizzly population. *Greater Yellowstone Coalition v. Servheen, et al.* 665 F.3d 1015, 1030 (9th Cir. 2011).

This Court overturned the District Court with respect to the adequacy of regulatory mechanisms. The Court found that the legally enforceable elements of the Conservation Strategy were adequate to support FWS's conclusion that there were adequate regulatory mechanisms in place - in particular, the adoption of standards into National Park Service compendia and National Forest Plans - to maintain a recovered Yellowstone grizzly population after delisting. *Id.* at 1031-1032.

IV. Yellowstone Grizzly Conservation and Recovery Under the ESA

In 1975, FWS listed the grizzly bear under the ESA as threatened in the 48 conterminous states. 3 E.R. 441-443. Recovery of the grizzly bear in the GYE has been a cooperative effort of multiple federal agencies and the states of Montana, Idaho, and Wyoming. In 1973, before the grizzly bear was even listed, managers created the Interagency Grizzly Bear Study Team ("Study Team"), a centralized research group to provide scientific information and inform management decisions in the GYE. 2 E.R. 89. Since then, the GYE bears have become the most studied grizzly bear population in the world. *Id.*

In 1983, the Interagency Grizzly Bear Committee ("IGBC") was created to coordinate management efforts and research action across multiple federal lands and states to recover the grizzly bear in the lower 48 states. *Id.* One of its objectives was to change land management practices to more effectively provide security and maintain or improve habitat conditions for the grizzly bear. *Id.* The Yellowstone Ecosystem Subcommittee, a subcommittee of the IGBC, was formed the same year to coordinate recovery efforts in the Yellowstone region. *Id.* The Montana Department of Fish, Wildlife and Parks ("MFWP"), Montana's fish and wildlife management agency, is a member of the Study Team, IGBC and the Yellowstone Ecosystem Subcommittee.

FWS completed a Recovery Plan for the grizzly bear in 1982, which

identified the GYE as one of six areas within the conterminous United States thought to support grizzly bears. 2 E.R. 89-90. The Recovery Plan was subsequently amended and supplemented to address the individual recovery zones. Notably, the 1993 amendments to the Recovery Plan stated that it was the intent of FWS to delist individual populations as they achieved recovery. 2 E.R. 98. The Recovery Plan contained two key components: habitat-based recovery criteria and demographic recovery criteria. Demographic recovery criteria included minimum population size, distribution of reproductive females and annual human-caused mortality limits. 2 E.R. 93. For the Yellowstone Recovery Zone, FWS updated both the habitat and demographic recovery criteria in 2007. 2 E.R. 90. The biologically-based habitat recovery criteria were developed with the goal of maintaining or improving habitat conditions at 1998 levels. *Id.* The year 1998 was selected as a baseline because habitat values at that time were known to be compatible with an increasing grizzly bear population. *Id.*

In 2016, revisions were proposed to the demographic recovery criteria concurrent with the proposed delisting rule to reflect the best available science, and the Recovery Plan Supplement was updated concurrent with the 2017 Final Rule. 2 E.R. 93. The revised Recovery Plan Supplement contains three demographic recovery criteria for the Yellowstone region population. The first demographic criterion establishes that the population "maintain a minimum population size of

500 grizzlies and at least 48 females with cubs-of-the-year." The second criterion requires that 16 of the 18 bear management units within the recovery zone "must be occupied by females with young, with no two adjacent units unoccupied during a 6-year sum of observations." The third calls for maintenance of the population around the 2002-2014 population estimate average of 674 grizzly bears. 2 E.R. 95-96.

Under the ESA, the population of the Yellowstone region grizzly bears recovered dramatically. In the early 2000s, grizzlies occupied roughly 68 percent of the suitable habitat. It is estimated that grizzlies now occupy 92 percent of the suitable habitat. 2 E.R. 92. When the grizzly bear was listed in 1975, estimates of the Yellowstone region population ranged from 136 to 312 individuals. 2 E.R. 89. From 1983 to 2002, the Yellowstone region grizzly population increased approximately 4.2 to 7.6 percent annually. From 2002 to 2011, the population growth rate slowed to 0.3 to 2.2 percent annually. 2 E.R. 93-94. This leveling off is attributed to an increase in population density. 2 E.R. 94. In 2015, the estimated population in what is now the Yellowstone Demographic Monitoring Area was 717 bears. 2 E.R. 114. The Demographic recovery criteria have all been met since 2004. 2 E.R. 95.

V. Yellowstone Grizzly Conservation After Delisting

A. The 2016 Conservation Strategy

The 2016 Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem ("Conservation Strategy") (3 E.R. 217, *et seq.*), released by the Yellowstone Ecosystem Subcommittee and approved by the IGBC in December 2016, will guide the management and monitoring of the GYE grizzly bear population and its habitat after delisting. 2 E.R. 96. It specifies and implements the population/mortality management, habitat, and conflict bear standards to maintain a recovered grizzly bear population for the future. *Id.* The Conservation Strategy contains objective, measurable habitat and population standards, and specifies clear state and federal management responses if deviations from these standards occur. *Id.* All the state and federal agencies which are party to the Conservation Strategy have signed a memorandum of understanding through which they have agreed to implement the Conservation Strategy. 2 E.R. 96; 3 E.R. 236-237.

The habitat component of the Conservation Strategy focuses on sustaining the recovered population within a Primary Conservation Area. The Primary Conservation Area is comprised of the former Recovery Zone. It is a core secure area for grizzly bears, where human impacts on habitat conditions will be maintained at or below levels that existed in 1998. 2 E.R. 102. The year 1998 was

chosen as a baseline because habitat conditions had been relatively constant for the previous decade and the population had been increasing from 4 to 7 percent per year. *Id.* The Primary Conservation Area is 9210 square miles (almost 6 million acres), approximately 98 percent of which is managed by either the National Park Service or the U.S. Forest Service. 2 E.R. 97.

The Conservation Strategy sets out three population standards that are similar to those in the revised Recovery Plan. Mortality (whether natural or human-caused, including hunting) must be limited to that level that would enable the population standards to be met. The population is annually surveyed and estimated, and mortality limits are applied within a Demographic Monitoring Area which includes the Primary Conservation Area plus most of the remaining suitable habitat in the Yellowstone region. 2 E.R. 85, 93. Maintenance of grizzly populations in accordance with the population standards is a state obligation under the Conservation Strategy. Wyoming, Idaho and Montana have entered a Tri-State Memorandum of Agreement ("Tri-State MOA") in which they have agreed to implement the mortality criteria in the Conservation Strategy and allocate discretionary mortality amongst the states.[2] 3 E.R. 236.

Along with habitat and population standards, the Conservation Strategy also includes habitat and monitoring protocols, provisions for management and

[2] "Discretionary Mortality" is defined as: Mortalities that are the result of hunting or management removals. 2 E.R. 213.

monitoring of grizzly bear/human conflicts, provisions for information and education programs and guidelines for implementation. *See*, 3 E.R. 217 *et seq.* After delisting, the Yellowstone Grizzly Coordinating Committee ("YGCC"), comprised of representatives from the two National Parks, five National Forests, the Idaho, Montana and Wyoming state fish and wildlife management agencies, three Tribes, and one representative from a local government in each of the three states, will replace the Yellowstone Ecosystem Subcommittee. The new committee will coordinate implementation of the Conservation Strategy. 2 E.R. 97.

B. State Plans

Montana, Idaho, and Wyoming have adopted state grizzly bear management plans. The state plans are incorporated into the Conservation Strategy as appendices. 2 E.R. 96. Together, the Conservation Strategy and the state plans describe and summarize the coordinated efforts required to manage the Yellowstone region grizzly bear population and its habitat such that its continued conservation is ensured.

Montana's Grizzly Bear Management Plan for Southwestern Montana ("Montana Plan") "works from the standards and commitments within the strategy providing state specific information or guidance where appropriate." MSER 17. It sets out the goals of managing for a recovered grizzly bear population in southwestern Montana, much of which is outside the Demographic Monitoring

Area, and the continued expansion of that population into areas that are biologically suitable and socially acceptable. MSER 18.

The Montana Plan contains specific provisions for population monitoring, response to livestock and human conflict, information and education, food storage regulations, use of bear repellents and deterrents, aversive conditioning and management control. *See* MSER 13 *et seq*. The Montana Plan also has additional requirements for population and habitat monitoring and nuisance bear guidelines including bear-human interaction risk management protocols, rapid response protocols and guidelines for nuisance bear determination and control. *Id.*

FWS recognized that since 1993, MFWP has implemented countless public outreach efforts to minimize bear-human conflicts. 2 E.R. 111. For example, MFWP requires that all black bear hunters pass a bear identification test before receiving a black bear hunting license. *Id.* MFWP also includes grizzly bear encounter management as a core subject in basic hunter education courses. *Id.* Montana has been actively involved in information and education outreach for over a decade, and its management plan contains chapters detailing efforts to continue current programs and expand them when possible. 2 E.R. 124.

In the process of developing its grizzly management and conservation program, Montana learned that biological recovery is not enough, there must be a significant degree of understanding and support for grizzlies by citizens and local

communities where bears exist. It is critical that the states take their obligations under state law and their commitments under the Conservation Strategy and state plans seriously. The record clearly shows that Montana has done so. Montana's statutes are enforceable, and its programs are not mere aspirations. Montana has been and will continue to actively conserve the grizzly bear in the Montana portion of the GYE.

STANDARD OF REVIEW

Review of the Plaintiffs' claims is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. § 706. Under the APA, a court may only set aside final agency action if that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A final agency action is considered to be arbitrary and capricious only if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Conversely, a final agency action should be upheld where a reasonable basis exists for FWS's decision. *See, Kern Co. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). In examining FWS's decision, the Court must "consider whether the decision was based on a consideration of the relevant factors

and whether there has been a clear error of judgment." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). The standard of review is "highly deferential," and, where supported by substantial evidence, FWS's findings must be upheld, even if that evidence is susceptible to more than one rational interpretation. *Id.*

Deference to FWS is highest "when reviewing scientific judgments and technical analyses within the agency's expertise." *N. Plains Res. Council Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011); *see also, Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-59 (9th Cir. 2009) ("We grant considerable discretion to agencies on matters requiring a high level of technical expertise."). Courts may uphold decisions of the FWS even if they are of "less than ideal clarity," as long as FWS's "path may be reasonably discerned." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43.

SUMMARY OF THE ARGUMENT

Montana adopts Federal Appellants' arguments in its Opening Brief (Doc. 45) with respect to the impact of delisting the Yellowstone DPS on other grizzly bear populations. In this brief, Montana demonstrates that FWS was not arbitrary or capricious in its conclusion that there are adequate regulatory mechanisms in place to protect the Yellowstone grizzly bear after delisting. Specifically, FWS

reasonably concluded that the Conservation Strategy need not commit to mandatory recalibration of mortality limits, population estimates and status review triggers. Further, FWS relied on the best scientific data available to determine that it was not necessary that the Conservation Strategy require translocation of bears from outside populations to the GYE (in order to enhance genetic diversity) should natural connectivity between populations not be achieved by a date certain.

ARGUMENT

FWS complied with both the ESA and APA when it concluded there are adequate regulatory mechanisms in place to protect the Yellowstone DPS after delisting.

In addition to the analysis purportedly required by *Humane Society v. Zinke* (865 F.3d 585 (D.C. Cir. 2017)), the District Court incorrectly found two fundamental flaws in the 2017 Final Rule. First, it found that FWS's failure to require a recalibration provision in the Conservation Strategy was arbitrary and capricious. Second, it found FWS's determination that it need not provide for either natural connectivity or translocation to be contrary to the best available science. These findings are erroneous. FWS reasonably relied on the Conservation Strategy's commitment to use, for the foreseeable future, the same population methodology that has been in use for many years, and its further commitment that, should a new methodology be considered, the best available science would be used

and an open process to evaluate whether to change to the new method would be conducted. Further, FWS rationally relied on the best scientific data available in evaluating the Yellowstone grizzly populations' genetic health and in reaching its conclusion that the provision of genetic augmentation by a date certain is unnecessary.

I. The Absence of a Mandatory Recalibration Provision in the Conservation Strategy was not Arbitrary and Capricious

Since 2007, the GYE grizzly bear population has been calculated annually using a population estimating model called Chao2. 3 E.R. 262. FWS has acknowledged that Chao2 is conservative; i.e., it is likely to underestimate population size. 2 E.R. 144-145. As the grizzly bear population has increased, model-averaged Chao2 estimates have become increasingly prone to underestimation. 3 E.R. 262. As a result, new population estimation methods are being explored. FWS acknowledged that this could someday result in the use of a new estimation approach. *Id.* The Study Team "may continue to investigate new methods for population estimation as appropriate; however, the model-averaged Chao2 method will continue to be used for the foreseeable future." *Id.*

The Conservation Strategy calls for management of a delisted population for a stable population within the Demographic Monitoring Area around the 2002-2014 modeled-average Chao2 estimate of 674 bears. 3 E.R. 227. The Conservation Strategy further provides for application of discretionary mortality limits that are

dependent on the previous years' population estimate using Chao2. *See,* 3 E.R. 257-260; 269-271. The term "recalibration" refers to the potential need to adjust mortality limits, population estimates, status review triggers, and population objectives if a new population estimator is adopted. 2 E.R. 147. Concern over the lack of a mandatory recalibration provision stems from the possibility that a new population estimator could suddenly show there are more bears in the Yellowstone population than previously thought. As FWS noted in the 2017 Final Rule, "[c]ommenters worried that, without this recalibration, adoption of a more accurate population estimation method would allow the States to kill hundreds of bears . . ." *Id.* In other words, the failure to recalibrate that is, to adjust the population objectives and mortality limits if the method for estimating population changes, could result in additional allowable discretionary mortality.

While FWS clearly acknowledged concern over the impact of a failure to recalibrate, it also acknowledged a concern that the number of bears that constitute a recovered population could change: "[O]ther commenters noted that new population estimation methodology should not be used to redefine what the recovered bear numbers are for future management decisions." *Id.* That is, these commenters felt that if the number of bears counted using Chao2 was deemed to be sufficient for recovery, the determination of what constitutes a recovered population should not change if the population estimator changes. To address these

countervailing considerations, the Yellowstone Ecosystem Subcommittee voted to include in the Conservation Strategy a commitment to use the Chao2 method of population estimation for the foreseeable future rather than include a mandatory recalibration provision. *Id*. This means that implementation of a new method to estimate population size would constitute a change to the Conservation Strategy, which requires evaluation by the Study Team and both a public comment period and approval by the YGCC. *Id.* Nevertheless, the District Court found that without a mandatory recalibration provision in the Conservation Strategy FWS could not reasonably conclude that adequate regulatory mechanisms exist to protect the Yellowstone grizzly bear. 1 E.R. 35. This conclusion is flawed for several reasons.

A. Potential adoption of a new population estimator is speculative

As the District Court acknowledged, review under the ESA cannot be speculative. 1 E.R. 39, citing *Bennet v. Spear,* 520 U.S. 154, 176 (1997). The Court was "not convinced that the risk posed by the potential adoption of a new estimator is too speculative or distant to require discussion within the Conservation Strategy" stating that "the risk presented by recalibration is beyond mere speculation." *Id.* Yet, even assuming - for the sake of argument - that there is some actual risk associated with adoption of a new population estimator, the potential for adoption of that new estimator *is itself speculative*. The final 2016 Conservation Strategy firmly commits to using the model-averaged Chao2 population estimator for the

foreseeable future to maintain the population around the average population size from 2002 to 2014, which was also determined using the Chao2 method. 2 E.R. 147, *see also,* 3 E.R. 262.

The ESA requires agency decisions to be made based on consideration of '*existing* regulatory measures.' *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 965 (N.D. Cal. 2010) (quoting 16 U.S.C. § 1533(a)(1)(D) (emphasis added). The ESA precludes FWS from identifying a threat to a species based on the mere possibility of a future regulatory change. *See Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (determination of threats to species "must be based on the current regulatory structure"). For this reason alone, the District Court's conclusion that the Conservation Strategy fails without a mandatory recalibration provision should be rejected.

B. The District Court improperly speculated about the risks associated with adopting a new population estimator

The YGCC has the authority to revise or amend the Conservation Strategy including the adoption of a new method to determine the grizzly population. 3 E.R. 319. The District Court apparently feared a worst-case scenario: that a new estimator showing a larger grizzly bear population than the Chao2 method would result in states lethally managing the population back down to the stated demographic goal of 674 bears – presumably through hunting. This fear is highly speculative and ignores both the process required for changing the Conservation

Strategy and the many possible results of doing so.

Any change to the Conservation Strategy must be based on the best biological data and the best available science and is subject to public review and comment. *Id*. It is entirely speculative – and indeed unreasonable – to simply assume that – after considering both the best biological data and best available science, as it must – the YGCC would not recalibrate its bear mortality limits as part of the process of adopting a new population estimator. It is also speculative to presuppose that *any* recalibration would be necessary if a new population estimator were to be adopted. For example, were Chao2 to yield a population of 700 bears and a new estimator a population of 720, recalibration may not be warranted. The fact is that we simply do not know what a new method of estimating population would yield, and it is speculative to conclude otherwise.

Finally, it would be highly speculative to assume that if at some point after delisting a new estimator were to show a higher population of bears, the states of Montana, Idaho and Wyoming would abruptly manage the population down to 674. The Supreme Court has rejected the idea that the ESA should be "implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997). Indeed, given the many uncertainties, it would in fact be arbitrary to include in the Conservation Strategy an absolute requirement that there be recalibration. That is why there is no such requirement.

C. FWS properly utilized the best scientific data available

The District Court found that "rather than rationally consider and apply the best available science, as demanded by APA and the ESA, [FWS] made a concession to the states to secure their participation in the Conservation Strategy." 1 E.R. 33. The District Court concluded that FWS "cannot negotiate away its obligation to make decisions 'solely on the basis of the best available science'." 1 E.R. 40, citing 16 U.S.C. §1533(b)(1)(A). (The ESA actually provides that FWS must make listing determinations 'solely on the basis of the best scientific and commercial data available.' 16 U.S.C. §1533(b)(1)(A).) When the 2017 Final Rule was being promulgated the best scientific data available were estimates of population made using Chao2 - which led to the conclusion that the population had recovered. Even though it was known to underestimate population size, it was rational to continue to rely on Chao2 post-delisting because no viable alternative existed. In fact, FWS analyzed possible alternative population estimators including "Mark-Resight", which was rejected because it was not sufficient for detecting population trend, and DNA sampling which was rejected as being cost prohibitive. 2 E.R. 147.

As the District Court noted, FWS recognized that recalibration was a matter of significant concern. 1 E.R. 36. However, the concern expressed in FWS emails by certain staff was not a concern over scientific data. It was a concern that if the

best available science (on estimating population) were to change post delisting, there was a potential that the states could increase their discretionary mortality unless recalibration occurred. That concern over the potential consequence of a possible future occurrence is not the best scientific data available at the time of delisting. It is in fact a concern about future management decisions. It follows that by choosing to commit to using Chao2 for the foreseeable future FWS has not violated its legal obligation to use the best scientific data available.

II. FWS's Determination That It Need Not Require Translocation of Bears from Outside the Yellowstone Population was Reasonable and Consistent with the Best Scientific Data Available

Because declines in genetic diversity are expected in isolated populations, FWS identified isolation of the Yellowstone region grizzly population as a potential threat when the grizzly bear was listed in 1975. 2 E.R. 116. In the 2017 Final Rule, FWS recognized that introduction of outside genetic material would benefit the Yellowstone region grizzly population in the long-term. *Id.* However, FWS rationally concluded, based on the best available science, that genetic concerns are not currently a threat to the GYE grizzly bear population. 2 E.R. 117.

A. FWS relied on the best available science and its conclusions were not arbitrary

FWS relied on multiple indicators of fitness to demonstrate that current levels of genetic diversity in the GYE grizzly population support healthy reproductive and survival rates. 2 E.R. 116. As evidence of genetic health FWS

cites normal litter size, no evidence of disease, high survivorship, an equal sex ratio, normal body size and characteristics, and a relatively constant population size within the monitoring area. *Id.* In fact, genetic heterozygosity values in the Yellowstone segment have increased slightly over the last few decades. *Id.* This explains why, whereas the 2007 Conservation Strategy called for translocation of grizzly bears from the Northern Continental Divide Ecosystem ("NCDE") to the GYE if no movement or successful genetic interchange was detected by 2020, the 2016 Conservation Strategy contains no such requirement but instead commits to monitoring of the population's genetic health. 2 E.R. 117. Thus, FWS correctly concluded that there is no immediate need for new genetic material. 2 E.R. 116. This conclusion does not deprive the bears of the potential for the introduction of additional genetic diversity in the future. If demonstrated effects of lowered heterozygosity among GYE grizzly bears reveal themselves, or other genetic measures indicate a problematic decrease in genetic diversity, in the absence of natural effective migration from the NCDE, translocation will be considered. 2 E.R. 117. In addition, Montana has committed to managing discretionary mortality in the area between grizzly bear populations in the GYE and the NCDE to retain the opportunity for natural movements of bears between the ecosystems. *Id.* Moreover, based on estimated grizzly bear distribution in the NCDE and GYE, when the 2017 Final Rule was published, the two populations were only 71 miles

apart. 2 ER 161.

Contrary to the District Court's ruling, (1 E.R. 41) (holding that FWS "misread the scientific studies it relied upon, failing to recognize that all evidence suggests that the long-term viability of the Greater Yellowstone grizzly is far less certain absent new genetic material"), FWS in fact rationally relied on the best available science to conclude that a lack of genetic diversity was not a current threat. The District Court found that FWS "illogically cobbled together two studies to reach its determination that the Greater Yellowstone grizzly population is sufficiently diverse at this time; in doing so, it ignored the clear concerns expressed by the studies' authors about long-term viability of an isolated grizzly population." 1 E.R. 45. But the District Court goes too far in second guessing FWS's interpretation of the science.

B. FWS's conclusion with respect to short-term genetic fitness were reasonable

The two studies that the District Court refers to are Miller and Waits (2003)[3] and Kamath et al. (2015) (Kamath).[4] Relying on both, FWS concluded that current effective population is more than four times the minimum effective population size

[3] Craig R. Miller and Lisette P. Waits, The History of Effective Population Size and Genetic Diversity in the Yellowstone Grizzly, Proceedings of the National Academy of Sciences of the United States of America, Vo. 100, No. 7 (Apr. 1, 2003). 3 E.R. 421 *et seq.*

[4] Pauline L. Kamath et.al., Multiple estimates of effective population size for monitoring a long-lived vertebrate: an application to Yellowstone grizzly bears, Molecular Ecology, 2015. 3 E.R. 400.

suggested in scientific literature. 2 E.R. 117.

Miller and Waits analyzed grizzly bear DNA from museum specimens dated 1912-1920 and 1959-1981 and for the period from 1992-1999 using data taken from either a previous study or hair samples collected for a different study. 3 E.R. 423-425. They used that data to estimate effective population size (N_e) and other genetic measures, and concluded that genetic diversity has declined slightly in the Yellowstone grizzly population since the early 20th century but that the decline was less than expected. 3 E.R. 426. Miller and Waits also compared N_e to the estimated total population size (N) to derive an N_e/N ratio of .27.

Focusing on a single statement that the appropriate effective population size to prevent the short-term effects of inbreeding is not known, the District Court found that Miller and Waits "only determined that the current (circa 2003) effective population size is likely to be near or greater than 100, on the basis of its estimate that 25 percent of the total population, which it estimated to comprise 400 individuals, constitute the effective population." 1 E.R. 46. Thus, the District Court concludes that Miller and Waits does not support FWS's reading that 100 individuals constitute "the minimum effective population size suggested in the literature." *Id.*

However, the relevant language from Miller and Waits does not support the District Court's interpretation:

> The minimum effective size to avoid the negative short-term effects of inbreeding is not known and probably varies between species. Based on domestic animal breeding, Franklin ([1980]) suggests Ne should remain [greater than] 50. ….. If recent evidence that N is at least 400 is accurate, then Ne is likely to be near or greater than 100 (0.27 x 400 = 108). In our opinion, it is unlikely that genetic factors will have a substantial effect on the viability of the Yellowstone grizzly *over the next several decades*.

3 E.R. 426 (emphasis added). While the District Court therefore may be technically correct that the Miller and Waits study does not conclusively establish a minimum Ne, the study nonetheless provides strong support for FWS's characterization of a Ne of 100 as the minimum necessary to avoid genetic problems over the next several decades.

The reasonableness of FWS's conclusion is buttressed by the more recent findings of the Kamath study. Kamath analyzed 729 tissue, blood and hair samples collected by the Study Team from Yellowstone area grizzly bears between 1962 and 2010. 3 E.R. 400. The authors used three approaches to estimate Ne or the effective number of breeders (Nb) over time. The District Court characterized the Kamath study as limited noting "it only states that effective population size may equal 42 to 66 percent of the total population, rather than the approximately 25 percent applied in Miller and Waits. FWS_Lit_005979." 1 E.R. 46. The District Court then noted that "the Service applied the high end of the range listed in Kamath – 66 percent – to determine that the Greater Yellowstone grizzly's current effective population size is 469." 1 E.R. 47.

The District Court is incorrect that FWS applied the Kamath ratio to find N_e of 469. On the contrary, it was Kamath, not FWS, that estimated the effective population size to be 469 in 2007.[5] Kamath did so through genetic analysis. The ratio was derived after the fact by comparing the results of that analysis to estimates of total (census) population size (N_c). In the 2017 Final Rule, FWS cited directly to Kamath. It did not perform its own mathematical calculation. 2 E.R. 117.

Not only is the District Court incorrect that FWS applied the Kamath N_e/N_c ratio, it appears to suggest FWS was arbitrary in its choice to apply the high end of the calculated range (0.66). If, at some future time, FWS were to apply Kamath's N_e/N_c ratio of .66, it would not be arbitrary. Kamath states: "Harmonic mean estimates of the N_e/N_c ratio based on EPA-derived N_e over the period from 1984 to 2007 were 0.66 and 0.42 when using the Chao2 and M-R-derived estimates of population size, respectively." 3 E.R. 406. Because grizzly population size in the Yellowstone area is estimated using Chao2, applying the 0.66 ratio to a Chao2 population estimate is not arbitrary, it is entirely consistent with Kamath.

Relying on both Miller and Waits, and Kamath, FWS rationally determined that there was no immediate need to augment the genetics of the GYE population.

[5] Kamath states: "EPA-derived estimates of Ne indicated an increasing trend, with over a fourfold increase in Ne from 102 (95% CI: 64-207) in 1982 to 469 (95% CI: 284-772) in 2007. 3 E.R. 405.

2 E.R. 117.

FWS acknowledged that "1 to 2 effective migrants from other grizzly bear populations every 10 years would maintain or enhance this level of genetic diversity and, therefore, ensure genetic health in the long term." 2 E.R. 117. In fact, the Miller and Waits study does not support the option of monitoring genetic diversity in the Yellowstone Ecosystem and facilitating gene flow only if a significant decline in diversity is detected. 3 E.R. 426. But, Miller and Waits does not suggest this needs to occur by 2020. Rather, the authors state:

> Because the need for gene flow into the YE is not urgent, we argue that concentrating current efforts on establishing intermediate populations and protecting and restoring intervening habitat are justified. If gene flow does not occur naturally *within several decades*, however, we argue that translocation should be conducted. . . . The viability of the Yellowstone grizzly bear population is unlikely to be compromised by genetic factors in the near future . . . the more immediate threats . . . are habitat loss and human-caused mortality. We argue that management should therefore focus on maintaining the YE and NCDE population at or above their current sizes and encouraging range expansion through natural dispersal and/or reintroduction.

Id., (emphasis added). Miller and Waits' recommendation to maintain GYE and NCDE populations at or above their current sizes and encourage range expansion is precisely what has occurred since the study was published in 2003 and it is exactly what the Conservation Strategy prescribes.

Kamath also opines that "the grizzly population could benefit from increased fitness following the restoration of gene flow…". 3 E.R. 410. But, Kamath found

that "current effective population sizes are sufficiently large to avoid substantial accumulation of inbreeding depressing, reducing concerns regarding genetic factors affecting the viability of Yellowstone grizzly bears." *Id.* Kamath's conclusion is that "multiple independent estimators of the genetically effective population size can be used to complement traditional ecological estimators of abundance to improve our understanding of eco-evolutionary processes and population monitoring for conservation and management. *Id.* In other words, Kamath recommends monitoring genetic health as well as total population size. Again, this is exactly the approach adopted by the Conservation Strategy, which provides for genetic monitoring. 3 E.R. 276.

The Conservation Strategy calls for the monitoring of the population for genetic health, and augmentation if necessary, while continuing to foster the opportunity for future natural genetic connection between the GYE and NCDE. Contrary to the District Court's conclusion, FWS analyzed the best scientific data available and its conclusions with respect to the science are rational. Accordingly, its conclusions were entitled to deference under the standard set forth by this Court. *See Northwest Ecosystem Alliance v. United States Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (FWS must consider the relevant factors and articulate a rational connection the facts found and the choices made).

C. The District Court irrationally dismissed Montana's commitment to and planning for connection between the GYE and NCDE

Not only does the District Court ignore the fact that the Conservation Strategy provides for monitoring of genetic health and the translocation of bears if necessary, it dismisses Montana's policy to manage for future connectivity. The District Court states that "there is no regulatory mechanism in place to address the threat [of continued isolation], only Montana's commitment to 'manage discretionary mortality' between populations in order to 'retain the opportunity for natural movements of bears between ecosystems'." 1 E.R. 47. The District Court then reasons that because those natural movements have not yet occurred, "it is illogical to conclude that the same opportunities for connectivity will produce different results in the future, particularly if one or both populations are delisted." *Id.* The District Court is incorrect.

Montana has planned for and is committed to retaining the opportunity for connectivity between the Yellowstone region and other grizzly bear populations. The Montana Plan, which is appended to and part of the Conservation Strategy, provides for the connectivity that it anticipates will ultimately provide genetic infusion to the Yellowstone population. It recognizes that impacts from climate change are best mitigated through well-connected populations of grizzly bears and that connectivity among grizzly populations also mitigates genetic erosion and

increases resiliency to demographic and environmental variation. MSER 53. Therefore, one of the plan's long-term goals is "to allow the grizzly bear populations in southwest and western Montana to reconnect through the maintenance of non-conflict grizzly bears in areas between the ecosystems." MSER 61, 2 E.R. 162. Connected populations is important enough that in formulating the Montana Plan, MFWP did not even consider an alternative to limit grizzly bear distribution to just the recovery area because such an approach would be "logistically impossible and biologically undesirable." *Id.*

Montana's approach to the possibility of grizzly bear hunting demonstrates that the plan is not simply aspirational but is a meaningful policy commitment. Anticipating the possibility of delisting the Montana Fish and Wildlife Commission adopted the Montana Grizzly Bear Hunting Regulations on February 11, 2016. *See,* MSER 1-12. These regulations expired in 2017 and would need to be readopted to be in effect (MSER 2), but they establish a framework for how hunting grizzly bears in Montana post-delisting will be managed. They include a fee schedule and delineate seven hunting districts in the Montana portion of the Yellowstone region. They also include a provision that licenses will be issued only after completion of the required hunter orientation class, that a license holder may take only one bear, that the number of licenses issued will not exceed the number of bears available to hunt (based on mortality thresholds and the allocation among

the states of Idaho, Montana and Wyoming) and that a hunter has a lifetime limit of taking only one Montana grizzly bear. *Id.*

The Montana Plan states that MFWP "would likely not institute hunting seasons in areas where bear density is low and removal of bears would negatively impact the potential for movement of grizzlies between ecosystems when desired and acceptable." MSER 73. This is in fact what has occurred.

The hunting regulations delineate seven hunting districts. While the number of licenses potentially available in those districts is yet to be determined, two districts, the Stillwater-Bighorn and Highland-Ruby are marked "CLOSED." MSER 4. This is significant because those two districts contain the Tobacco Root and Highland mountains, which were identified in the Montana Plan as potentially important for migration. MSER 56. ("Maintaining presence of non-conflict grizzly bears in areas between the NCDE management area and the demographic monitoring area of the GYA, such as the Tobacco Root and Highland Mountains, would likely facilitate periodic grizzly movements between the NCDE and GYA."). This demonstrates that in formulating and adopting the hunting regulations, MFWP and the Montana Fish and Wildlife Commission adhered to the Montana Plan.

The D.C. Circuit Court recognized that "empowering the Service to alter the listing status of segments rewards those States that most actively encourage and

promote species recovery within their jurisdictions." *Humane Soc'y of the United States v. Zinke*, 865 F.3d 585, 599. The Montana plan is one component of the Conservation Strategy that provides a comprehensive set of management standards and monitoring protocols that are designed to ensure long term genetic health of the GYE grizzly population. Montana's commitment to grizzly bear conservation should not be so lightly dismissed.

CONCLUSION

The ESA has done its work. The Yellowstone region grizzly bear has recovered, and Montana contributed significantly to that recovery. The GYE grizzly population has reached its recovery target and is healthy and robust. The Conservation Strategy and Montana Plan are designed to ensure that this recovery will be maintained. That is enough to satisfy the delisting criteria. But the Conservation Strategy and Montana Plan go further by setting the stage for improvements to the population's genetic health by providing a path for future connectivity between the GYE and the NCDE populations.

For the reasons stated herein, the judgment of the District Court should be reversed with respect to its holdings that FWS acted arbitrarily when it determined that the Conservation Strategy need not provide for a recalibration mechanism and that FWS's determination that it need not provide for either natural connectivity or translocation is contrary to the best available science.

Respectfully submitted June 6, 2019.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned is not aware of any related cases pending in this Court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

50 CFR § 424.11(c)(d) and (f)
Factors for listing, delisting, or reclassifying species

…

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Over utilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or manmade factors affecting its continued existence.

(d) The factors considered in delisting a species are those in paragraph (c) of this section as they relate to the definitions of endangered or threatened species. Such removal must be supported by the best scientific and commercial data available to the Secretary after conducting a review of the status of the species. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1)*Extinction.* Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2)*Recovery.* The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3)*Original data for classification in error.* Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

…

(f) The Secretary shall take into account, in making determinations under paragraph (c) or (d) of this section, those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

16 U.S.C. 1531

Congressional findings and declaration of purposes and policy

(a) Findings. The Congress finds and declares that--

…

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes. The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C. 1532(6) and (20)

Definitions

…

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

…

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

16 U.S.C. § 1533(a)(1) and (b)(1)(A)

Determination of endangered species and threatened species

(a) Generally.

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

…

(b) Basis for determinations.

(1) (A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation,

or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Appellants State of Montana and Montana Department of Fish, Wildlife and Parks' Opening Brief** with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 6, 2019.

I certify that I served the foregoing brief on this date by mail, postage prepaid, to the following unregistered case participants:

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